In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1110

ANTHONY J. BUFFA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the trial court erred in instructing the jury as to both subsections of 18 U.S.C. 2.[1]

After a jury trial in the United States District Court for the Northern District of Ohio, petitioner was convicted on one count of possessing counterfeit currency with intent to defraud and on one count of fraudulently passing and uttering counterfeit currency, both in violation of 18 U.S.C. 472 and 2. He was also convicted on one count of willfully

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[1] 18 U.S.C. 2 provides:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

and knowingly selling counterfeit currency, intending that it be passed as genuine, in violation of 18 U.S.C. 473 and 2. He was sentenced to concurrent terms of four years' imprisonment on each of the three counts. The court of appeals affirmed in a *per curiam* opinion (Pet. App. 11-13).

The evidence at trial showed that petitioner and a confederate, Vincent Tedesso, sold $99,200 in counterfeit United States currency to Secret Service agents posing as buyers. Petitioner negotiated the terms of the sale with the agents and then called Tedesso, who was to bring the counterfeit notes to the agents; petitioner also rented two interconnecting hotel rooms in which the transaction was to take place (Tr. 12-15). When Tedesso arrived at one of the hotel rooms with the counterfeit notes, an agent inspected the notes without removing them from the bag in which Tedesso brought them. The transaction was then completed in petitioner's presence, after which petitioner assured the agents that they "could do business at any time, at any place, in the future" (Tr. 17-21).

Petitioner contends that it was improper for the trial judge simultaneously to instruct the jury on both subsections of 18 U.S.C. 2 because they are "mutually exclusive" (Pet. 7). But there is no substance to that argument in the context of the instant case.

The government did not rely solely on 18 U.S.C. 2 as the theory of its case; the court specifically instructed the jury that it could convict petitioner "either directly or as an aider and abettor" (Tr. 153, 159). The evidence at trial showed that petitioner in fact personally committed the acts charged: he possessed the counterfeit notes and transferred them with the knowledge that

they were counterfeit and with the intent that someone should later accept them as genuine. Thus, petitioner was shown to have directly violated 18 U.S.C. 472 and 473. In these circumstances, he could suffer no prejudice from the court's instruction on both subsections of 18 U.S.C. 2.

In any event, the court's instruction on 18 U.S.C. 2 was not error. Subsection (a) of 18 U.S.C. 2 provides that anyone who aids and abets the commission of an offense shall be punishable as a principal. Subsection (b) provides that whoever causes another to do an act which would be a criminal offense if he personally did the act is punishable as a principal. The evidence at trial demonstrated that petitioner violated both subsections.

He aided and abetted Tedesso in possessing and passing the counterfeit notes, by negotiating the terms of the sale, calling Tedesso and renting the hotel room. He caused Tedesso to possess and pass the counterfeit notes, by calling him and telling him to bring the notes to the agents at the hotel. Thus, whether Tedesso was an agent of petitioner under subsection (b) or a willing accomplice under subsection (a) was immaterial to the question of petitioner's guilt. In these circumstances, the court's instruction was proper.[2]

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[2]Petitioner correctly notes that in *United States* v. *Inciso*, 292 F. 2d 374 (C.A. 7), and *United States* v. *Barash*, 412 F. 2d 26 (C.A. 2), certiorari denied, 396 U.S. 832, the trial court instructed only on subsection (b) of 18 U.S.C. 2. Neither case, however, is authority for the petitioner's assertion that the two subsections are "irreconcilable" (Pet. 7), and petitioner cites no authority for that proposition or his assertion that they are "mutually exclusive" (*ibid.*).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.[3]

ROBERT H. BORK,
Solicitor General.

MARCH 1976.

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[3]Petitioner also repeats without argument (Pet. 6) his claim, made in the court of appeals, that an instruction given by the court relating to so-called "subsidiary facts" (Tr. 160) was plain error. The court of appeals thoroughly considered and rejected this contention in an opinion on which we rely. See Pet. App. 11-13.

BLEED THROUGH